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83-919

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BOB D. PITCHFORD,

PETITIONER,

V.

PEOPLE OF THE STATE
OF ILLINOIS,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner was denied due process of law under the Fourteenth Amendment to the Constitution of the United States and his rights against unreason able searches and seizures under the Fourth Amendment where the Appellate Court of Illinois reversed the trial court's suppression of two tapes of electronically overheard and recorded conversations because both conversations were overheard and recorded pursuant to a court order which was issued in violation for the Fourth and Fourteenth Amendments.

A. The State's Attorney's authorization for the eavesdrop was facially defective where it proceded the informant's consent; and

B. The application for an eavesdropping device contained insufficient information to justify a finding of probable cause to believe that felonies had been committed; and

C. The entry of the eavesdrop order within the time limit authorized by the court was fatal error.

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IN THE

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BOB D. PITCHFORD,

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v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS

Now comes Bob D. Pitchford, Sheriff of Jefferson County, Illinois, and prays that this Court issue its Writ of Certiorari to the Appellate Court of Illinois, Fifth Judicial District, to review its reversal of a suppression order entered by the Circuit Court of Jefferson County, Illnois.

OPINION BELOW

The Appellate Court of Illinois, Fifth Judicial District, reversed the trial court's suppression order in a published opinion, People v. Pitchford, 115 Ill. App. 3d 164, 450 N.E.2d 349 (1983). That opinion is reproduced in the Appendix. The Supreme Court of Illinois denied Petitioner's petition for leave to appeal. That order is also reproduced in the Appendix.

JURISDICTIONAL STATEMENT

Petitioner's petition for leave to appeal to the Supreme Court of Illinois was denied October 4, 1983. This Court's jurisdiction is predicated upon Title 28, U.S.C. s 1257 (c)(3), since the judgment of the Illinois Appellate Court has infringed rights, privileges and immunities specially set up and claimed under the Constitution of the United States as provided in Amendments Four and Fourteen.

State statutes involve Illinois Revised Statutes, Ch. 38, s 31-4, s 38-3, s 108A-3 and s 108 A-4 (b) and (c).

STATEMENT OF THE CASE

On December 3, 1981, Donald E. Leckrone ("Leckrone"), a Special Agent for the Illinois Department of Law Enforcement-Division of Criminal Investigation, applied for a court-order authorizing the use of electronic eavesdropping equipment to overhear and record conversations between Petitioner and a Wilbert Tobias ("Tobias"). The overhear was to occur between 6:00 p.m., on December 3, 1981, and 6:00 p.m., December 6, 1981.

In support of the standardized application, Leckrone stated under oath his belief that the felonies of official misconduct and obstruction of justice were being or would be committed. The information upon which Leckrone based his conclusion was:

> On Dec. 3, 1981, at approx. 10:15 A.M. Jefferson County Sherifff Bob D. Pitchford advised Wilbert E. Tobias, whom the Sheriff believes to be involved in gambling activity, to tell his friends to "pull back, the town's full

of state police and treasury agents."
(C.54)[1]

The above application did not reveal whether Leckrone had personal knowledge of the facts stated therein or whether he was relying on information supplied to him by a third party.

The application was submittted to Judge Robert H. Howerton with a form captioned "State's Attorney's Authorization for a Petition and Order Approving the use of an Eavesdropping device." Therein, Robert Shuff ("Shuff"), the State's Attorney of Jefferson County, Illinois, stated, in relevant part, that he authorized Leckrone to make application to a Circuit Judge for an order authorizing or approving the use of an eavesdropping device to overhear (and record)

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1 "(C.___)" refers to the Common Law Record.

a conversation or conversations occurring between Tobias, a consenting party, and Petitioner, which was expected to occur between 6:00 p.m. on December 3, 1981, and 6:00 p.m. on December 6, 1981. (C. 53)

Also tendered to Judge Howerton in support of the application, was a form entitled "Consent by Party of Conversation to be Subject to Electronic Surveillance by use of an Eavesdropping Device." (C. 58) The latter document was signed by Tobias. Therein, Tobias stated, in pertinent part, that he voluntarily consented to the Illinois Division of Criminal Investigation conducting electronic surveillance (by use of an eavesdropping device) of a conversation (s) he might have between himself and others, expected to occur between 6:00 p.m. on December 3, 1981 and 6:00 p.m. on December 6, 1981.

Petitioner's name is omitted on the Consent Form signed by Tobias. Further, the form demostrates that Tobias did not give his consent until 6:47 p.m. on December 3, 1981 (c.58) which

was 47 minutes after court authorization was given.

Judge Howerton ordered the overhearing and recording of conversations to occur between 6:00 p.m. on December 3, 1981 and 6:00 p.m. on December 6, 1981, but he did not sign the order until 7:48 p.m. on December 3, 1981. (C. 57)

Petitioner's Motion to Suppress the results of the electronic eavesdropping made three arguments. First, he alleged the petition for the order authorizing electronic eavesdropping contained no basis or supporting facts on its face indicating why or under what circumstances Judge Howerton would have reason to conclude Petitioner "believed" Tobias was involved in gambling activities. Secondly, Petitioner argued that the petition for the eavesdrop order did not set forth sufficient facts to believe the eavesdropping ordered would pertain to a felony. Finally, Petitioner contended the order was deficient because it was signed within the time limits authorized by the order.

On April 12, 1982, Judge Richard E. Richman

suppressed the results of the December 3, 1981, eavesdrop order holding that the documents, on their face, showed there was no prior consent by Tobias at the time the State's Attorney gave his authorization, (Tr. 48) [1], and because of the language of paragraph 1. (a) of the petition whereas it showed no basis on which the State knew or reasonably would have known that Petitioner "believed" Tobias was involved in gambing activity. (Tr. 49-50) The court stated he was not going to go back and change documents in order to permit the evidence to be admitted. (Tr. 50)

All federal questions sought to be reviewed were first raised at the trial level during the suppression hearing proceeding. (Tr. 46-8) The trial court granted the suppression motion. The issues were again raised in the Illinois Appellate & Supreme Courts.

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[1] "(Tr.___)" refers to the suppression hearing transcript.

REASONS FOR GRANTING THE WRIT

A. The Appellate Court Erred in Reversing the Trial Court's Finding That The State's Attorney's Authorization Was Facially Defective Where It Preceded Tobias' Consent.

Petitioner contends that the State's Attorney's authorization must precede the consent. The record on its face demonstrates the consent occurred after the State's Attorney gave his authorization. (C. 53, C. 54, Tr. 48-49)

Tobias' consent impeaches the State's Attorney's authorization because the forms palpably show the consent was not given until 17 minutes after the authorization was obtained. Ergo, the trial court properly ruled the State's Attorney had made his decision before Tobias consented (Tr.31, 48), and lacking his required consent, the strict procedural requirement was not met.

The Illinois Appellate Court determined the time entries were merely administrative surplusage, and the errors were only technical.

But Federal law reveals the paramount importance of procedural requriements (e.g., the time entries) to the underlying purpose of the eavesdropping statute. As the Court stated in United States v. Kalustian, 529 F.2d 585, 588 (9th Cir. 1976):

"Procedural steps provided in the Act require strict adherence. (Citation omitted) The importance of these procedures reflects the dual purpose of Title III, which is to ... "(protect) the privacy of wire and oral communications, and (2) (delineate) on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized..."

529 F.2d at 588

Accord, People v. Satek, 78 Ill. app. 3d 543, 396 N.E. 2d 1133, 1138 (1979), where the court declined the state's invitation to hold that standing to suppress an illegal recording in Illinois is as narrow as under the Federal statute or under the Fourth Amendment to the United States Constitution.

Similarly, the procedural steps in the Illinois Eavesdropping Statute ("IES") also require "strict scrutiny" espoused in People v. Porcelli, 25 Ill. App. 3d 142, 323 N.E. 2d 1 (1975).

In United States v. Lamonge, 458 F.2d 197,

199 (6th Cir. 1972) cert. den. 93 S.Ct. 153, 409 U.S. 863, 34 L.Ed.2d 110, the court, confronted with an analogous issue, held that absence of a date from wiretap orders made duration of the orders unlimited by their own terms and, as such, the orders were invalid in that they authorized a wiretap for an unreasonable length of time, and the fact that the date was subsequently added Nunc Pro Tunc did not change the fact that the wiretap authorizations were on their face invalid at the time they were issued, and evidence obtained through their use was inadmissable.

The Illinois Appellate Court's ruling as to the above issue is in conflict with the Lamonge case and this Court is therefore asked to grant review.

Procedural requirements cannot be considered mere technicalities as the Illinois Appellate Court determined. Lamonge, supra, 458 F2d 197; People v Evans, 78 Ill. App. 3d 996, 398 N. E. 2d 326 (1979)

B. The Appellate Court Erred In Reversing The Trial Court's Finding That The Application For An Eavesdropping Device Contained Insufficient Information To Justify A Finding Of Probable Cause To Believe That The Felonies Had Been Committed.

When the trial court determined that the application, on its face, failed to show probable cause for issuance of the eavesdrop order (Tr. 48-49) the court was explicitly referring to the following section of the standardized petition for the eavesdrop order tendered by Leckrone:

"1. (a) Official Misconduct. (Chap. 38-33-3) and Obstructing Justice (Chap. 38-31-4). The Ill. Div. of Crim. investigation has been conducting a criminal investigation regarding gambling activity in and around Jefferson County area. This investigation was initiated approx. August, 1981. On Dec. 31, 1981, at approx. 10:15 a.m., Jefferson Co. Sheriff Bob D. Pitchford advised Wilbert E. Tobias, whom the Sheriff believes to be involved in gambling activity, to tell his friends to "pull back, the town's full of state police and treasury agents." (C. 54) (Emphasis added)

The trial court's ruling that the above statement, in support of the petition, was insufficient to support a finding of reasonable cause for issuance of the eavesdropping order was reversed.

The phrase "whom the Sheriff <u>believes</u> to be involved in gambling activity" (Emphasis added) is presumptuous because of the word "believes" and did not meet the probable cause standard. [1]

Merely because Petitioner allegedly advised Tobias to "tell his friends to pull back, the town's full of state police and treasury agents" (C. 54), even if true, does not muster up to the probable cause standard required by the Fourth Amendment. Such an admonishment by the Petitioner may have been a simple warning to Tobias and his friends to observe the law. Police officers often urge abstention from

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[1] Similarly, affidavits for search warrants must allege facts and not suspicions, beliefs, or surmises. <u>People v. Williams,</u> 27 Ill. 2d 542 544, 190 N.E. 2d 303, 304, (1963)

criminal conduct by using whatever language is deemed appropriate to deter violation.

Assuming, arguendo, Petitioner did advise Tobias to inform his friends to pull back because the town was full of various police officers, such an admonishment by Petitioner was not a violation of the Illinois Official Misconduct or Obstruction of Justice statutes. In order to charge the offense of official misconduct, the State was required to set forth (in the petition) one or more elements of the applicable statute, Ill. Rev. Stat. Ch. 38 s 33-3 (a) thru (d).

Leckrone's petition did not state any of the elements.

The purported statement "whom the Sheriff believed to be involved in gambling activity, to tell his friends to pull back, the town's full of state police and treasury agents," does not describe conduct which falls within the purview of the Official Misconduct statute.

The Appellate Court failed to determine whether or not the purported statement was in

violation of the Official Misconduct or Obstruction of Justice statutes. Rather, the Court stated the remark concerned concealment of illegal activity from police detection. Pitchford, 115 Ill. App. 3d 164, 168.

In order to charge the offense of Obstructing Justice, Leckrone was required to set forth in the petition one or more elements of the applicable statute, Ill. Rev. Stat. 1981 Ch. 38 s 31-4 (a) thru (c).

Leckrone's petiton did not state any of the elements.

Hence, it is congently clear that the particulars set forth on the face of the petition did not assert culpable acts to render Petitioner liable for prosecution under either statute.

The Appellate Court's conclusion that the purported statement was in violation of a criminal statute defeats the requirement that probable cause and not conclusions must be set forth in the application. As was stated in United States v. Scott, 331 F. Supp. 233 (D.C.

Cir 1971):

> Magistrate cannot find probable cause for wiretap order upon mere conclusions of affiant but must have details of underlying circumstances in affidavit. 331 F.Supp. at 242

Additionally, Leckrone's petition for the order failed to state facts from which one could conclude Tobias told Leckrone the substance of his purported conversation with Petitioner. There was no evidence of what Tobias may have told Leckrone before Leckrone requested the December 3rd order. This deficiency conflicts with the Court's decision in United States v. Ventresca, 380 U.S. 102, 109, 12 L. Ed. 2d 684, 85 S. Ct. 741, 746 (1965), where the following was said:

> "Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police."
> 380 U. S. 102, at 109.

Because the Illinois Appellate Court failed to follow the decision in Ventresca, supra, this Court is requested to exercise its power of supervision under Rule 17 (c) 1 and grant certiorari.

In view of the foregoing standards, the trial judge did not err when he suppressed the tape-recorded conversations.

The determination by the trial court that probable cause was lacking, is further bolstered because the informant in this case was a member of the criminal milieu. Numerous court have held that when the informant is either the victim of the crime or a disinterested witness, the reliability requirement is more easily satisfied if not dispensed with altogether. Since Tobias was neither the victim or a disinterested witness, but in fact a member of

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1 Supreme Court Rule 17 (c) provides:
CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI
"When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." (Emphasis supplied)

the criminal milieu, his information was required to meet a higher standard of reliability. See, e.g., People v. Hester, 39 Ill. 2d 489, 237 N. E. 2d 466 (1968)

The Illinois Appellate Court held that s 108A-3 of the IES does not require that the application, in and of itself, establish reasonable cause to believe a felony had been or was about to be committed. This finding was without merit because s 108A-3 (a)(3) does require a "description of the facts establishing reasonable cause to believe that additional conversations of the same type will occur thereafter." Even if the application, in and of itself, is not required to establish reasonable cause, the other documents tendered along with the application offered nothing more to show reasonable cause.

As ground for the authorization, s108A-4 (b) provides that the judge may authorize the use of an eavesdropping device where it is found that:

"(b) there is reasonable cause for

believing that an individual is committing, has committed, or is about to commit a felony under Illinois law;

(c) there is reasonable cause for believing that particular conversations concerning that felony offense will be obtained through such use ***."

(Ill. Rev. Stat., Ch. 38, s 108A-4 (b); (c).)

Ergo, in order for the issuing judge to grant the application, reasonable cause must be embodied in the petition or supporting documents.

There are no details on the face of Leckrone's petition establishing the felony or felonies that had been, was being, or about to be committed. This short-coming contravenes with paragraph 108A-3 (a) (2) (a) which requires details be stated in the application.

Nothing in paragraph 1. (b) of Leckrone's petition minimally provides probable cause to believe a conversaton relating to a felony would be overheard; only a statement that there was going to be an endeavor to obtain a conversation to be overheard and nothing whatsoever relating

to commissin of a felony. (C. 54)

Further, the petition does not indicate why, or under what circumstances, it could be concluded a felony had previously been committed or how one was purportedly going to be committed. No details or underlying facts were shown on the petition to support the conclusion the Petitioner "believes".

In Aquilar v. Texas, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964), this Court enunciated criteria upon which search warrants issued on the basis of informant information are to be judged. It was held, inter alia, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were. " 84 S.Ct. at 1514.

As in Aquilar, supra, Judge Howerton should have similarly been informed of some of the underlying circumstances from which Leckrone concluded the petitioner believed Tobias' friends to be involved in gambling activity. This information should have been provided but

it was not done presumably because the information never existed. The following excerpt from Aquilar is supportive:

"The purpose of the (affidavit), then, is to enable the appropiate magistrate ... to determine whether the "probable cause" required to support a warrant exists. (T)he commisioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion."

378 U. S. 108, at 112

And in United States v. Kleve, 465 F2d 187 (8th Cir. 1972) the court held that the probable cause requirement for the issuance of wiretap orders under federal law is the same as for the issuance of search warrants.

Applying the probable cause standard to the Illinois Eavesdroppping Statute [1], the application in this case, like the affidavit in

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[1] Under Illinois law - both statutory and case law - the phrases "probable cause" and "reasonable cause" have been used interchangeable and have been held to be legally synomous." Ill. Rev. Stat., Ch. 38 s 107-2(b)(c); People v. Wright, 56 Ill.2d 523, 309 N. E. 2d 537, 539-540.

Aquilar, supra, 378 U. S. 108, fails to "pass muster". It did not inform Judge Howerton of the source, or the "underlying circumstances," from which Leckrone concluded the offenses of official misconduct and obstructing justice were being committed or that certain conversations relating to those offenses would be obtained through the use of electronic eavesdropping.

Under probable cause standards, Leckrone's application would be defective for yet another reason: If his knowledge is based on other than his personal knowledge, there is no statement of the underlying circumstances from which Judge Howerton could conclude this source of information was "credible" or "reliable". Accord, People v. Monoson, 75 Ill. App. 3d 1, 393 N. E. 2d 1239 (1979).

It was incumbent upon the State's Attorney in this cause to follow the procedures properly. The finding by the trial court that he did not should not have been disturbed by the Illinois Appellate Court and was constitutionally erroneous.

C. The Appellate Court Erroneously Reversed The Trial Court's Ruling That The Entry Of The Eavesdropping Order Within The Time Limit Authorized By The Court Was Error.

The Illinois Appellate Court's ruling that the authorization of illegal activity by entry of the eavesdropping order after the time specified in the order "was only technical" (115 Ill. App. 3d at 169) contravenes the requirement that the procedural steps in the IES be given "strict adherence" under the policy of "strict scrutiny" espoused in People v. Porcelli, 25 Ill. App. 3d 142, 149, 323 N. E. 2d 1 (1975).

In reference to omission of information required by the Federal Wiretap Act, the court, in United States v. Lee, 542 F2d 353 (6th Cir. 1976) stated:

"Whether the omission was inadvertent or purposeful . . . cannot be excused as a mere technical violation.

542 F.2d at 355.

Judge Howerton authorized the use of an eavesdropping device to occur effective 6:00 p.m. on December 3, 1981. The time and date of issuance of the order, as shown at the bottom of the order, was December 3, 1981, at 7:48 p.m.(C. 57)

The order was therefore, to be effective from 6:00 p.m. on December 3rd, which was 47 minutes prior to when Tobias' alleged consent was given, 30 minutes before the State's Attorney authorized it, and allowed eavesdropping to commence 1 hour and forty-eight minutes prior to the Order being signed by the judge.

The entry of the order, therefore, within the time limit authorized on the face of the order, was error, and fatal to the order issued by Judge Howerton and justified the suppression order by Judge Richman at the suppression hearing.

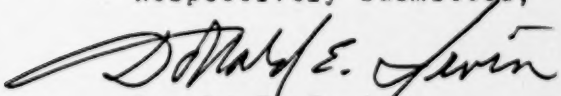
The trial court was correct when the court stated, "(i)t put the (issuing) court in a position of authorizing illegal activity." (Tr. 39)

The Illinois Appellate Court's ruling gives the eavesdropping statute an unusual and unconstitutional construction. However, under both federal and state statues the procedural steps must be given "strict adherence" under the policy of "strict scrutiny". Lee, supra, 542 F.2d 353, 355; Porcelli, supra, 25 Ill. App. 3d 142. 149.

CONCLUSION

For the reasons set out above, it is respectfully requested that this Court issue a Writ of Certiorari to the Appellate Court of Illinois for the Fifth District to review the Court's judgment in the instant case.

Respectively submitted,



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APPENDIX

NO. 82-220

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, vs. ROBERT D. PITCHFORD, Defendant-Appellee.	)Appeal from)the Circuit)Court of)Jefferson)County,)Illinois.))Honorable)Richard E.)Richman)Judge)residing

JUSTICE WELCH delivered the opinion of the court:

Defendant Robert D. Pitchford, sheriff of Jefferson County, Illinois, was charged on December 7, 1981, with official misconduct, obstructing justice, solicitation to obstruct justice, conspiracy to obstruct justice, and obstructing a police officer. These charges resulted from evidence obtained with an eavesdropping device. On April 12, 1982, the circuit court of Jefferson County granted the defendant's motion to suppress tape recordings of telephone conversations between the defendant and Wilbert E. Tobias, an informant for the Illinois Department of Law Enforcement. Without holding a evidentiary hearing, the trial court ruled that the documents submitted to the circuit court to obtain the eavesdropping order were facially deficient in three ways. The court held that the State's Attorney authorization for

the use of an eavesdropping device was invalid because the State's Attorney signed it a few minutes before Tobias signed a written consent form. The court also held that application for the eavesdropping device failed to state reasonable cause. In addition, the court stated that the order was improper because the time limits it authorized had begun to run by the time the order was signed. The State appeals the order suppressing the evidence. 87 Ill.2d R. 604(a).

The eavesdropping order was issued by the Circuit Court of Williamson County on December 3, 1981. Specifying in his petition what felony was about to be committed, Special Agent Donald E. Leckrone of the Illinois Division of Criminal Investigatition alleged the following information:

1. (a) Official Misconduct (Chapt. 38-33-3) and Obstructing Justice (Chap. 38-31-4) The Ill. Div. of Crim. Investigation has been conducting a criminal investigation regarding gambling activity in and around Jefferson County area. This investigation was initiated approx. August, 1981. On Dec. 3, 1981, at approx. 10:15 A.M., Jefferson Co. Sheriff Bob D. Pitchford advised Wilber E. Tobias, whom the sheriff believes to be involved in gambling activities to tell his friends to 'pull back, the town's full of state police and treasury agents.'"

Special Agent Leckrone further stated in the petition that "Mr. Tobias will recontact Sheriff Pitchford and request further information in regards to the previous conversation on Dec. 3, 1981." The application also requested that the eavesdropping device be used from 6 p.m. that day until 6 p.m. on December 6, 1981.

Other documents submitted to the Circuit Court of Williamson County included the State's Attorney's authorization approving the use of the device and Wilber Tobias' written consent allowing his conversation to be recorded. The State's Attorney's authorizaton, signed by Robert Shuff, State's Attorney of Jefferson County, included a notation of the time as 6:30

p.m. on December 3, 1981. Tobias' consent form contained the notation that it was signed at 6:47 p.m. that day, and the eavesdropping order was issued by the court at 7:48 p.m. Later that night, two telephone cnversations between Tobias and the defendant were recorded. These recordings led to the criminal charges against the defendant.

On appeal, the State argues that the trial court's order suppressing the evidence was erroneous for three reasons. We will consider each argument in turn.

First, the State asserts that the Illinois eavesdropping statute does not require that the State's Attorney have the consent of the informant before he signs a form seeking a eavesdropping order from a circuit judge. This court addressed a similar issue in People v. Scribner (1982), 108 Ill.App.3d 1138, 440 N.E. 2d 160. In that case, the sole written authorization by the consenting party included a date and time notation later than the time at which all surveillance was completed. Nonetheless, this court held that the consent by the participant in the conversaton was proper, in part, because the statute requires only that the authorizing court find that one party "has or will have consented* * *." (Ill.Rev.Stat. 1981, ch. 38, par. 108A-4(a); People v. Scribner) Since a court need not be presented with proof either of past or present consent at he time of the eavesdropping application, the fact that Wilbert Tobias signed a consent form seventeen minutes after the State's Attorney signed his authorization does not vitiate Tobias' consent to the eavesdropping in the instant case. People v. Scribner.

The State's second argument is that the trial court erred in finding the eavesdropping order insufficient on its face to establish reasonable cause. Specifically, the court held that paragraph 1(a) of the application, quoted in full above, did not explain how the police knew that the defendant believed informant Tobias to be involved in gambling activity.

The statutory requirements for obtaining permission to use an eavesdropping device are set forth in section 108A-3 and 4 of the Illinois Criminal Code. The eavesdropping application must include "a statement of the facts and cirsumstances relied upon by the applicant to justify his belief that an order should be issued including * * *" (Ill.Rev.Stat. 1981, ch. 38, par 108-A-3(a)(2)(a); People v. Scribner). After this information is submitted to the circuit court, the judge must determine if "there is reasonable cause for believing that an individual is committing, has committed, or is about to commit a felony* * *" (Ill.Rev.Stat. 1981, ch 38, par. 108A-4(b)). The phrases "probable cause" and "reasonable cause" have been held to be "legally synonymous." People v. Monoson (1979), 75 Ill.App.3d 1, 9, 393 N.E. 2d 1239, 1246.

It is a well accepted principle that in determining the existence of reasonable cause, courts must view the application in a common sense fashion. (People v. Sylvester (1980), 86 Ill.App.3d 186, 407 N.E.2d 1002; United States v Kirk (8th Cir. 1976), 534 F2d 1262). Moreover, the Illinois statute does not require that reasonable cause be established solely from facts stated on the application; the statute allows for the court to request and consider "additional testimony, witnesses, or evidence in support of the application." (Ill.Rev.Stat. 1981, ch. 38, par 108A-3(b); People v. Moore (1980), 90 Ill.App.3d 760, 413 N.E.2d 516; see also People v. Daehler (1978), 57 Ill.App.3d 944, 373 N.E. 2d 776). When the defendant in People v. Moore argued that there was insufficient information in an eavesdropping application to establish reasonable cause, the court held that such an applicaton may properly plead only the felony involved, so long as the court is supplied with specific details through other evidence. People v. Moore.

The felonies involved in the case at bar were clearly stated by name and criminal code section

number in paragraph 1(a) of the State's application. The application stated that the felonies of official misconduct and obstructing justice had been, were being, or were about to be committed. The Illinois Criminal Code defines official misconduct as follows:

"A public officer or employee commits misconduct when, in his official capacity, he commits any of the following acts:

(a) Intentionally or recklessly fails to perform any mandatory duty as required by law; or

(b) Knowlingly performs an act which he knows he is forbidden by law to perform; or

(c) With intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or

(d) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law; or

(e) knowlingly and intentionally executes a false document which authorizes the disbursement of public funds or the disposal of public property.

* * *" (Ill.Rev.Stat. 1981, ch. 38, par. 33-3)

The Code's definition of obstructing justice states:

"A person obstructs justice when, with intent to prevent the apprehensions or obstruct the prosecution or defense of any person, he knowlingly commits any of the following acts:

(a) Destroys, alters, conceals or disguises physical evidence, plants false evidence, furnishes false information; or

(b) Induces a witness having knowledge material to the subject at issue to leave the State or conceal himself; or

(c) Possessing knowledge material to the subject at issue, he leaves the State or conceals himself.

* * *" (Ill.Rev.Stat. 1981, ch. 38, par. 31-4.)

Therefore, the test for reasonable cause in the

case at bar is whether the totality of the facts and circumstances were sufficient to warrant the belief by a person of reasonable caution that at least one of these offenses had been, was being or would be committed. People v. Sylvester.

The trial court refused to hold an evidentiary hearing to determine what additional evidence, if any, was presented to te issuing judge. While the State should not have been limited to information on the face of its application to show that reasonable cause was established, we do not feel that this limitation imposed by the trial court rendered the imformation accepted by the court insufficient to support the eavesdrop.

The facts and circumstances described in the State's eavesdropping application would in themselves lead a person of reasonable caution to believe that the sheriff was taking steps to impede a police investigation. Even if the phrase objected to the the suppression judge -- "whom the sheriff believes to be involved in gambling* * *" -- is sticken, the remaining portion of the application still establishes reasonable cause (see People v. O'Dell (1980), 84 Ill.App.3d 359, 405 N.E. 2d 809). The State's application quotes the sheriff as saying to informant Tobias, "pull back, the town's full of state police and treasury agents." Only a contorted interpretation of this statement would allow the conclusion that the sheriff's remarks did not concern the concealment of illegal activity from police detection. This conduct by a law enforcement official established reasonable cause for the circuit judge to believe that a felony either had already been committed, or was about to be committed. (People v. Sylvester; People v. Moore.) Therefore, the trial court erred when it held that the State's eavesdropping application was facially insufficient to establish reasonable cause.

The State's final argument is that there was no error in the entry of the eavesdropping order after the time limit specified in the order

begun to run because the order had not no legal force until it was signed by a judge. Although the court order authorized eavesdropping as of 6 p.m. December 3, 1981, a notation by the issuing judge shows that he signed the document at 7:48 p.m. that day. The suppression court stated that this action "put court in a position of authorizing illegal activity." We disagree. There is no suggestion in the record that any unauthorized, illegal eavesdropping actually took place. Accordingly, any error created by the inconsistency in the stated time of the order was only technical and did not warrant suppression of the evidence. People v. Sylvester.

For the foregoing reasons, we reverse the order of the circuit court of Jefferson County which suppressed the recorded conversations and remand this cause for further preceedings.

REVERSED AND REMANDED.

HARRISON, P.J. and KARNS, J., CONCUR.

ILLINOIS SUPREME COURT
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October 4, 1983

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No. 58423 - People State of Illinois, respondent, vs. Robert D. Pitchford, petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Very truly yours,

Juleann Hornyak

Clerk of the Supreme Court

P.S. The Mandate of this Court will issue to the Appellate Court on October 26, 1983.

Office - Supreme Court, U.S.
FILED
JAN 7 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-919

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D., 1983

BOB D. PITCHFORD,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

Whether this Court should review a federal constitutional issue where the judgment below is supportable on independent state grounds.

Whether this Court should review a claim that was not pressed or passed upon in the Illinois Appellate Court.

Whether this Court should review the Illinois Appellate Court's interpretation of the Illinois Eavesdropping Statute.

Whether the State's eavesdropping application contained sufficient information to establish probable cause for the trial court to issue an eavesdropping order.

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THE STATE'S EAVESDROPPING APPLICATION CONTAINED SUFFICIENT INFORMATION TO ESTABLISH PROBABLE CAUSE FOR THE TRIAL COURT TO ISSUE AN EAVESDROPPING ORDER.

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No. 83-919

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D., 1983

BOB D. PITCHFORD,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

OPINION BELOW

The opinion of the Appellate Court of Illinois, Fifth District, in this case was entered on April 26, 1983. The Illinois Supreme Court denied leave to appeal on October 4, 1983. The opinion of the Appellate Court of Illinois is reported at 115 Ill. App. 3d 164, 450 N.E.2d 349 (1983).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). However, as treated more fully in the argument contained herein, petitioner has not shown any

reason for this Court to exercise discretion to grant the petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS

Petitioner relies on the Fourth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was charged on December 7, 1981, with official misconduct, obstructing justice, solicitation to obstruct justice, and obstructing a police officer. These charges resulted from evidence obtained with an eavesdropping device.

The eavesdropping order was issued by the Circuit Court of Williamson County on December 3, 1981. The application for the eavesdropping device stated in relevant part:

> On December 3, 1981, at approx. 10:15 A.M., Jefferson Co. Sheriff Bob D. Pitchford advised Wilbert E. Tobias, whom the Sheriff believes to be involved in gambling activity, to tell his friends to "pull back, the town's full of state police and treasury agents."

The petition further stated that Tobias would recontact the petitioner to inquire further into their conversation of that date. The application requested that the eavesdropping device be used from 6:00 p.m. that day until 6:00 p.m. on December 6, 1981.

Other documents submitted to the Circuit Court of Williamson County included the State's Attorneys' Authorization approving the use of the device and Wilbert Tobias' written consent allowing his conversation to be recorded. The State's Attorney's authorization was signed at 6:30 p.m. on December 3, 1981. Tobias' consent form was signed at 6:47 p.m. that day. The eavesdropping order was issued by the court at 7:48 p.m.

Later that night, two telephone conversations between Tobias and the petitioner were recorded. These recordings led to the criminal charges against the petitioner.

On April 12, 1982, the Circuit Court of Jefferson County granted the petitioner's motion to suppress the recordings. The trial court ruled that the documents submitted to the circuit court were facially deficient in three ways. First, the State's Attorney's authorization for the use of an eavesdropping de-

vice was signed by the State's Attorney a few minutes before Tobias signed a written consent form. Second, the eavesdropping device failed to state reasonable cause. Third, time limits authorized by the order had begun to run by the time the order was signed.

On April 26, 1983, the Appellate Court of Illinois, Fifth District, reversed the order of the circuit court. *People v. Pitchford*, 115 Ill. App. 3d 164, 450 N.E.2d 349 (1983). The appellate court found that the fact that Wilbert Tobias signed a consent form seventeen minutes after the State's Attorney signed his authorization did not vitiate Tobias' consent to the eavesdropping. The Court further held that the State's eavesdropping application was not facially insufficient to establish reasonable cause. Finally, the Court found that any error created by the inconsistency in the stated time of the order was only technical and did not warrant suppression of the evidence. The Court remanded the cause to the circuit court for further proceedings.

On October 4, 1983, the Illinois Supreme Court denied petitioner's petition for leave to appeal.

REASONS FOR DENYING THE WRIT OF CERTIORARI

THE JUDGMENT BELOW IS SUPPORTABLE ON INDEPENDENT STATE GROUNDS, THUS RENDERING THE CONSTITUTIONAL ISSUES NOT APPROPRIATE FOR REVIEW BY THIS COURT.

The trial court suppressed the court authorized tape-recorded conversations between the petitioner and an informant on the grounds that the court order was issued in violation of the Illinois Eavesdropping Statute, Ill. Rev. Stats., 1981, ch. 38, § 108A-1, *et seq.*; 108A-3; 108A-3(a); 108A-4; 108A(a) and 108A-5. As recognized by the petitioner in his petition for leave to appeal to the Illinois Supreme Court, the "trial judge did not say he was granting the suppression motion for constitutional reasons." Petition for Leave to Appeal at 7. Similarly, the Appellate Court of Illinois, Fifth District, did not rest its decision on constitutional grounds. Rather, the Court found that the documents submitted to the circuit court to obtain the eavesdropping order was sufficient to satisfy the statutory requirements of the Illinois Eavesdropping Statute. The opinion of the Illinois Appellate Court does not even mention the Fourth or Fourteenth Amendments to the United States Constitution. Thus, the judgment of the Illinois Appellate Court is correct on the basis of state law alone. Accordingly, it would be inappropriate for this Court to grant certiorari and decide constitutional issues which are not necessary to the resolution of the case. See *Cousins v. Wigoda*, 419 U.S. 477, 486-87 (1975).

THIS COURT SHOULD NOT REVIEW PETITIONER'S FOURTH AMENDMENT CLAIM SINCE IT WAS NOT PRESSED OR PASSED UPON IN THE ILLINOIS APPELLATE COURT.

This Court has long held that its certiorari jurisdiction extends only to those federal questions that have been both raised and decided in the state court below. *Crowell v. Randell*, 10

Pet. 368, 391, 9 L.Ed. 458 (1836); *McGoldrick v. Compaignee Generale*, 309 U.S. 430, 435-436, 84 L.Ed. 849 (1940); *State Farm Mutual Insurance Co. v. Duel*, 324 U.S. 154, 160, 65 S.Ct. 573 (1945). This "not pressed or passed upon below" rule was recently reaffirmed by this Court in *Illinois v. Gates*, 103 S.Ct. 2317 (1983).

The requirement that a federal question be raised and decided in the state court below has not been met in the instant case. As recognized by the petitioner in his Petition for Leave to Appeal to the Illinois Supreme Court, "the trial judge did not say he was granting the suppression motion for constitutional reasons." Petition for Leave to Appeal at 7. Similarly, the decision of the Illinois Appellate Court did not rest on constitutional grounds. Rather, the Court found that the documents submitted to the circuit court to obtain the eavesdropping device were sufficient to satisfy the statutory requirements of the Illinois Eavesdropping Statute. Thus, it is clear that the Illinois Courts did not address the question of whether the petitioner was denied his constitutional rights under the Fourth and Fourteenth Amendments.

Moreover, petitioner failed to raise his federal constitutional issue in the Illinois courts. His petition for leave to appeal to the Illinois Supreme Court argued only that "the trial court correctly suppressed two tapes of electronically overheard and recorded conversations where both conversations were overheard and recorded pursuant to a court order which was issued in violation of the Illinois Eavesdropping Statute." Petition for Leave to Appeal at 2. Specifically, the Fourth and Fourteenth Amendments to the United States Constitution were not cited in his petition. Petitioner's failure to raise this federal question in the Illinois courts precludes him from raising the issue in the instant petition for a writ of certiorari.

Therefore, Respondent submits that this Court should not grant a writ of certiorari to review an issue not addressed by the

Illinois Appellate Court or raised in the state courts by the petitioner.

THIS COURT SHOULD NOT REVIEW THE ILLINOIS APPELLATE COURT'S INTERPRETATION OF THE ILLINOIS EAVESDROPPING STATUTE.

Petitioner contends that the State's Attorneys' authorization must precede the informant's consent. He further argues that the entry of the eavesdrop order within the time limit specified in the court order contravened the procedural requirements of the Illinois Eavesdropping Statute. Significantly, petitioner does not attack the validity or the constitutionality of the Illinois Eavesdropping Statute. Rather, petitioner's arguments are premised on the construction of the Illinois Eavesdropping Statute.

This Court has long held that the Supreme Court lacks jurisdiction to construe state legislation. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 91 S.Ct. 1400 (1971). A decision of a state court resting upon the construction and not the validity of a statute does not present a federal question. *Grand Gulf Railroad v. Marshall*, 53 U.S. 165 (1851); *Snell v. Chicago*, 152 U.S. 191, 14 S.Ct. 489 (1894); *Fury v. King County*, 141 U.S. 668, 12 S.Ct. 128 (1891).

Thus, the instant petition does not present a federal question and this Court should deny certiorari.

THE STATE'S EAVESDROPPING APPLICATION CONTAINED SUFFICIENT INFORMATION TO ESTABLISH PROBABLE CAUSE FOR THE TRIAL COURT TO ISSUE AN EAVESDROPPING ORDER.

Petitioner argues that the application for an eavesdropping device contained insufficient information to justify a finding of probable cause to believe that felonies had been committed. In support of this argument petitioner cites this Court's opinion in

Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1969), where this Court held that an affidavit must contain some of the underlying circumstances indicating that the informant was credible or that his information was reliable. *Id.* at 114. Petitioner suggests that the application in the instant case was insufficient because the trial court was not informed of the underlying circumstances indicating that the informant Tobias was reliable.

This Court recently abandoned the "two-pronged" test of *Aguilar* and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584 (1969) in *Illinois v. Gates*, 103 S.Ct. 2317 (1983). In its place, the Court substituted the "totality of the circumstances" analysis that traditionally has informed probable-cause determinations. Under the "totality of the circumstances" test, the application in the instant case clearly showed sufficient reasonable cause for issuance of the eavesdropping order.

The application indicates that the informant believed the sheriff "to be involved in gambling." Moreover, as recognized by the Illinois Appellate Court,

> The State's application quotes the sheriff as saying to informant Tobias, "pull back, the town's full of state police and treasury agents." Only a contorted interpretation of this statement would allow the conclusion that the sheriff's remarks did not concern the concealment of illegal activity from police detection. This conduct by a law enforcement official established reasonable cause for the circuit judge to believe that a felony either had already been committed, or was about to be committed.

People v. Pitchford, supra, 450 N.E.2d at 352.

Thus, the State's eavesdropping application contained sufficient information to establish probable cause for the trial court to issue the eavesdropping order. This Court should deny the petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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